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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, *et al.*,

Appellants,

v.

BOOKER T. HILLERY, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

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CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right . . . to petition the Government for a redress of grievances."

QUESTION PRESENTED

May a state, consistent with the First and Fourteenth Amendments, ban all press interviews with designated willing prisoners, at all penal institutions, and under all circumstances, while numerous other members of the public are allowed to visit prisoners, absent a showing that such a total ban is reasonably and necessarily related to the advancement of a compelling or substantial governmental interest?

STATEMENT OF THE CASE

Appellees are California prisoners who sought to be interviewed by members of the media. Their requests were denied by virtue of California Department of Corrections Manual Section 415.071, which provided: "Press and other media interviews with specific individual inmates will not be permited."[1]

Initially, the single district judge concluded, on September 29, 1972, that §415.071 violated the First

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[1] Defendants-appellants acknowledged that the denial of media interviews as to all plaintiffs except Hillery was based upon the challenged regulation, §415.071 (A.34, 36, 38, 44, 111). As to Hillery, they claimed: "Such a visit was not considered a media interview, but a special purpose visit, for which no showing of need was made." (A.111, 119). Compare the contemporaneous justification offered by defendant Park to Earth Magazine editors on October 5, 1971: "you are not a friend of prior acquaintance." (A.31, 32). However, the Amended Complaint alleged, without contradiction by defendants, that Earth Magazine editors requested permission to visit Hillery, not only to discuss possible publication of his writings, but also "for the purpose of gaining information for their own articles concerning prisons." (A.26). Thus, in this latter respect, a "media interview" had clearly actually been sought for Hillery, too.

Amendment, and he enjoined its enforcement (A.2). After the state indicated that a three-judge district court was required (A.84), the September 29, 1972 order was vacated, and a temporary restraining order pursuant to 28 U.S.C. §2284(3) was granted, on November 1, 1972 (A. 3).

On November 9, 1972, defendants-appellants promulgated interim regulations, Administrative Bulletin No. 72/40, permitting news media interviews with designated willing prisoners, under limited circumstances (A. 104).

Subsequently, a three-judge district court was convened to determine the constitutionality of §415.071 as originally worded. On August 16, 1973, a majority of that court found that the statewide regulation banning all press interviews with designated willing prisoners, at all penal institutions, and under all circumstances, was not shown to be "reasonably and necessarily" related to the advancement of a "compelling" governmental interest, observing:

> "[W]hile prison discipline, inmate safety, and rehabilitation are indisputably 'compelling state interests' . . . , regulations advancing those interests must be tailored so as not to unnecessarily restrict First Amendment rights."[2]

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[2]The majority opinion was written and signed by District Judge Williams. By Memorandum letter, District Judge East concurred. (See Appendix "B" attached to our motion to affirm herein.) The late Circuit Judge Hamlin wrote a separate opinion, concurring on the ground that "even under to (sic) broader 'rational basis' analysis, the blanket prohibition of inmate interviews with the media must fall. As the majority notes there is insufficient evidence in the record to substantiate such a complete ban." 364 F. Supp., at 205.

The court therefore, declared §415.071 unconstitutional, and ordered the defendants-appellants to "present to the court proposed regulations comporting to [its] decision" within 30 days, and to "permit the interviews sought in this litigation at the earliest practicable time under reasonable conditions and supervision." *Hillery v. Procunier*, 364 F. Supp. 196, 202, 205 (N.D. Cal. 1973).[3]

SUMMARY OF ARGUMENT

Persons in prison, like other individuals, have the right to petition the government for redress of grievances. In order to effectively communicate their grievances through the channel of public opinion, which in turn may reach public officials, prisoners need to have meaningful contact with the press. Face-to-face interviews are essential because alternative methods of communicating are inadequate.

Prison officials are required to demonstrate, by facts, that their blanket prohibition upon individual press interviews is reasonably and necessarily related to some valid penal interest. No such showing was made here. In fact, the California Director of Corrections has admitted his correctional preference for a more flexible regulation, but his attorney advised him that an across-the-board policy was legally required.

The State has available to it less restrictive means than the challenged overbroad regulation for serving its legiti-

[3] Defendants-appellants neither sought nor obtained any stay of the district court's August 16, 1973 order. Some of the requested interviews have already taken place. And, defendants-appellants have submitted to the court below their proposed new regulations. Final approval of regulations has not yet occurred, as hearings on the propriety of the proposed regulations are still being held.

mate correctional interests. It may impose reasonable restrictions as to the time, place and manner of press interviews. Acting in good faith, and in particularized circumstances, prison officials may impose limitations on visits by the media, which are actually necessary to maintain security, discipline and good order.

ARGUMENT

I.

THE CALIFORNIA PRISON BAN UPON ALL PRESS INTERVIEWS WITH DESIGNATED WILLING PRISONERS HAS NOT BEEN SHOWN TO BE REASONABLY AND NECESSARILY RELATED TO THE ADVANCEMENT OF A COMPELLING OR SUBSTANTIAL GOVERNMENTAL INTEREST, AS REQUIRED BY THE FIRST AND FOURTEENTH AMENDMENTS.

Two years ago, this Court said:

"Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.' "

Cruz v. Beto, 405 U.S. 319, 321 (1972).

Recognizing that effective protection of the right of access to courts requires the invalidation of even indirect restraints, this Court has guaranteed prisoners the unfettered opportunity to petition judicial authorities, *Ex Parte Hull*, 312 U.S. 546, 549 (1941), the availability of a

transcript or recordation of prior habeas corpus hearings, *Long v. District Court of Iowa*, 385 U.S. 192 (1966), the availability of legal assistance, *Johnson v. Avery*, 393 U.S. 483, 488 (1969), an adequate law library, *Younger v. Gilmore*, 404 U.S. 15 (1971), and relaxation of the standards to be applied to prisoner-prepared complaints, *Haines v. Kerner*, 404 U.S. 519 (1972).[4]

While courts continue to be available to enforce the constitutional and statutory rights of prisoners, it does not follow that the judiciary can or should be the primary forum for resolution of the myriad grievances asserted by prisoners against the criminal justice system in general, or prison officials in particular. The right to petition the government for redress of grievances includes, not only effective access to the courts, but also, and perhaps more importantly, effective access to the other branches of government, legislative and executive. See generally, Comment, *A Prisoner-Press Interview Right*, 11 Am. Crim. L. Rev. 273, 283-86 (1972).[5]

It is here that the crucial role played by the press–in bringing to the public's attention information concerning prison conditions–becomes relevant:

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[4] It has been suggested that *Haines, supra* "may well prove to be the American prisoner's *Marbury v. Madison.*" Kutak and Klippert, *Prisons on the Endangered List*, 11 Am. Crim. L. Rev. 165, 169 (1972).

> "Much as *Marbury v. Madison* opened the way to judicial review of legislation, it is felt that *Haines* enunciates a new policy of the Supreme Court permitting federal courts to review prison administration policy. The liberal standard established by the Court for hearing *pro se* complaints indicates its desire to allow inmates the opportunity to challenge prison procedures." *Id.*, n. 14.

[5] Kutak and Klippert, *supra* n. 4, mention "the need to protect and expand the sources of information which do influence the Congress in terms of bills introduced and hearings scheduled." 11 Am. Crim. L. Rev., at 174-75.

"Where no provision is made for meaningful contact with the press, prisoners are denied their only opportunity to effectively communicate their grievances through the channel of public opinion. Without interview access to the press—use of the press to reach public officials through the public—the prisoners' right to petition the legislative and executive branches of Government remains illusory."

Comment, *supra*, at 287.[6]

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[6]In remarks prepared for the National Conference on Corrections, at Williamsburg, Virginia, on December 7, 1971, the Chief Justice stated:

"Two and one-half years ago, in discussing corrections problems at the ABA meeting in Dallas, Texas, I urged that lawyers and judges – and indeed citizens generally – visit prisons and form their own judgments. The Young Lawyers' Section of the ABA took on the burden of promoting a Prison Visitation Program. [See, 9 Cr. L. Rptr. 2120 (1971).] . . . Few things would help more than having the public fully informed on the problems of prisons and the burdens of those who administer them . . . What is desperately needed is that [administrators] have the resources and the authority that only public support and legislative action can provide. The people of this country can bring that about if they will see firsthand how their institutions are being run and what support they receive."

Interestingly, one of the defendants in this case has written:

"A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the President of the local Ladies' Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs.

Park, *On Being Medium Nice to Prisoners*, [1973] Wash. U. L. Q., 607, 615.

The remote location of some prisons may make it extremely difficult for many citizens to visit them, a problem less substantial for a reporter on assignment.

As a "community ombudsman," the media can report, not only the incidence of crime, but the effectiveness of the system designed to control it. See, Vanden Heuvel, *The Press and The Prisons*, Columbia Journalism Review, p. 35 (May/June 1972).

Closely related to the prisoner's First Amendment right to petition the government for redress of grievances, is his equally compelling First Amendment freedom of speech, as well as the freedom of the press.[7]

A. The Applicable Legal Standard.

Decisions of this Court in First Amendment cases have required–

> "that official action with adverse impact on First Amendment rights be justified by a public interest that is 'compelling' or 'paramount,' . . . justifiable government goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press or association."
>
> *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972).
>
> "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."
>
> *N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).*

The overwhelming majority of lower federal courts have applied this two-step analysis to cases involving prisoners' First Amendment rights. In order to limit such freedoms, state prison officials have the burden of showing: 1) that

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[7] Freedom of speech and of the press and the rights of assembly and petition, "though not identical, are inseparable." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

the challenged regulation is required by a compelling state interest, and 2) that the method chosen to limit the right is the least restrictive means of serving that interest. See, *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971); *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971); *Hoggro v. Pontesso*, 456 F.2d 917 (10th Cir. 1972); *Goodwin v. Oswald*, 462 F.2d 1237, 1244 (2d Cir. 1972); *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).[8]

Keeping in mind that First Amendment principles are applied "in light of the special characteristics of the . . . environment," *Healy v. James*, 408 U.S. 169, 180

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[8] Appellants assert that "A reasonableness standard has been invoked by some courts to evaluate regulations which impair the practice of religion" in prison, citing *O'Malley v. Brierley*, 477 F.2d 785, 795 (3d Cir. 1973). Significantly, however, the "*O'Malley* court went on to explain: "The regulation [would] be reasonable only if the alternative chosen (complete exclusion) resulted in the least possible 'regulation' of the constitutional right consistent with the maintenance of prison discipline." This "least restrictive alternative" approach is consistent with the one taken by the court below, in reliance upon *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970), which appellees support. It is interesting to note the following statement made by appellants in the district court, regarding *Carothers*:

> "We submit that the court in *Carothers* adopted the correct view when it concluded that 'if the state had given some explanation . . . that indicated the action was *reasonably and necessarily* related to prison security or the prisoner's rehabilitation, we would be reluctant to interfere with its internal administration and regulations.'" (emphasis supplied) (A. 82-83).

By omitting *Carothers* from their brief in this Court, appellants seem to have changed their position as to the appropriate legal standard.

(1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969), we submit that the general principles are sufficiently flexible to deal with administrative rules of correctional agencies, just as they are with all other governmental agencies. Of course, the results in particular cases will often be different because in may prisoner cases the officials will be able to justify certain restrictions by showing that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation' " of the prison. Cf. *Healy, supra; Tinker, supra*, 393 U.S. at 509.

But such a showing must be "factually supported by the record." Cf. *Healy, supra*, 408 U.S. at 188; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Pickering v. Board of Education*, 391 U.S. 353, 570-73 (1968). Justification for extraordinary restrictions on the rights of individuals cannot be presumed. There must be *evidence* of likely interference with a legitimate correctional interest.[9] And there must be a showing that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Cf. *Healy, supra*, 408 U.S. 189-90 n. 20; *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972) ("the regulation must be narrowly tailored to further the State's legitimate interest"); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 n. 8 (1972).[10]

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[9] "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker, supra*, 393 U.S. at 508.

[10] See also, *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *United States v. Robel*, 389 U.S. 258, 268 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 602, 609 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The court below sensibly recognized that–

"To the extent that *Carothers* [n. 8, *supra*] can be read as qualifying otherwise broad First Amendment liberties in the prison context, this court agrees that, while the stricter standard applies, the State can generally illustrate a compelling interest more readily than it can when defending regulations affecting the free population. This is so because prisons, by their very nature, are institutions inhabited by persons who abused various liberties, some of whom have illustrated a propensity for violence, who are forced to live in close confines. There is a lower threshold of 'clear and present danger' in these institutions. But while prison discipline, inmate safety, and rehabilitation are indisputably 'compelling state interests' (See *Carothers, supra,* at 1024), regulations advancing those interests must be tailored so as not to unnecessarily restrict First Amendment rights."

Hillery v. Procunier, 364 F. Supp., at 202.[11]

B. The Necessity For Face-to-Face Individual Interviews.

Appellants initially take issue with the district court's finding "that face-to-face interviews with media representatives are a vital element in the prisoners' rights under the First Amendment." *Hillery v. Procunier,* 364 F. Supp. 196, 200-01 (N.D. Cal. 1973). Appellants contend that prisoners have adequate alternative methods of communicating with the press, to wit, by letters and manuscripts to media representatives (Br. 10), through

[11]Of course, non-First Amendment rights asserted by prisoners would appropriately be judged under a less stringent standard. Cf., *McGinnis v. Royster,* 410 U.S. 263 (1973).

other visitors and correspondence (Br. 11), and by press tours on a random basis (Br. 13).

However, as the district court herein and several other trial courts have found, these alternatives are an inadequate substitute for an individual personal interview.

> "[T]here are many inmates who would be deprived of their right to communicate if they could only correspond but not meet personally with newsmen. Further, there are many prison situations which can only be explored fully and accurately by a face-to-face interview."
>
> *Burnham v. Oswald*, 342 F. Supp. 880, 885 (W.D.N.Y. 1972).
>
> "Newsmen, like lawyers and judges, need to size up those from whom they receive information and the face-to-face interview is the most important technique of doing so."
>
> *Houston Chronicle Publishing Co. v. Kleindienst*, 364 F. Supp. 719, 730 (S.D. Tex. 1973).[12]

And, in *Washington Post v. Kleindienst*, 357 F. Supp. 770, 773 (D.D.C. 1972), which is being argued in tandem with the instant case, the court agreed that–

> "[c]ommunication by correspondence is . . . too impersonal and time consuming. In order to write reliable stories, . . . there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write, prison tours and related conversations with individuals or groups

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[12] Accord, *McMillan v. Carlson*, 14 Cr. L. Rptr. 2365 (D. Mass. Dec. 31, 1973); *Globe Newspaper Co. v. Bork*, 14 Cr. L. Rptr. 2444 (D. Mass. Feb. 12, 1974); *Mimms v. Philadelphia Newspapers*, 352 F. Supp. 862, 866 (E.D. Pa. 1972).

are . . . too hit-and-miss, too limited, too casual, too unproductive to enable a reporter to probe a given situation."[13]

The Court below observed that–

"the random selection conditions a prisoner's exercise of his right to express himself on the luck of the draw. And, under this method, the prisoner with the most to say, may, with bad luck, never be able to say it effectively." 364 F. Supp. at 200.

These findings are not "clearly erroneous," Rule 52(a), F.R.C.P., and they should, therefore, not be set aside.

Curiously, California prisoners engaged in *commercial* writing, for publications, are allowed to meet with their publishers, with official approval on a case-by-case basis (Br. 11-12). (A. 124, 244-45). No such individualized authorization was provided for non-commercial media interviews, under §415.071.[14] Thus, California has

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[13]See also, *Washington Post v. Kleindienst*, 357 F. Supp. 779, 781 (D.D.C. 1972), aff'd, ___ F.2d ___ , 14 Cr. L. Rptr. 2421 (D.C. Cir. Feb. 21, 1974):

"The Court has determined on the basis of detailed factual findings filed herewith that private personal interviews are essential to accurate and effective reporting. Ethical newspapers rarely publish articles based on unconfirmed letter communications. Reliability of such information must be determined by face-to-face confrontation. This is universally recognized by experienced journalists and demonstrated by the results of many confidential interviews conducted during the recent Attica investigation."

The "detailed factual findings," referred to above, can be found in Appendix "C" to Appellants' Brief, in *Pell v. Procunier*, No. 73-918, pp. 52-55, which has been consolidated with the instant case.

[14]Director Procunier testified that, as a correctional matter, he would actually prefer a more selective regulation regarding media interviews, but that his attorney advised him that an across-the-board policy was legally mandated (A. 303). No reason was ever given, however, for treating author-publisher meetings any differently.

created the anomalous situation of according protection to commercial speech, while denying it to *free* speech, a disparity that the First Amendment could hardly suffer. Cf. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (impermissible distinction between labor picketing and other peaceful picketing invalidated under Equal Protection Clause.). See also, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.* 413 U.S. 376 (1973).

C. The State's Asserted Justification For §415.071.

In examining the state's asserted reasons for §415.071, the following excerpt from this Court's per curiam opinion in *New York Times v. United States*, 403 U.S. 713, 714 (1971), seems apposite:

> " 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' Bantam Books v. Sullivan, 372 U.S. 58 (1963); see also Near v. Minnesota, 283 U.S. 697 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)."

The district court evaluated four grounds offered by the state in support of the challenged regulation, and it found them all to be insufficient justification for an across-the-board ban upon personal media interviews of willing prisoners.

1. *Administrative Burden*

The District Court concluded that the state made an insufficient factual showing of administrative burden, observing that, in answers to interrogatories, Warden Nelson stated that "requests by prisoners for interviews

with media are rare, and none are recalled" (A. 54). With respect to the number of interviews requested by outside media persons, the Warden said that the prison had no record of such information (A. 54).

Nevertheless, the court below indicated that reasonable regulations as to the time, place and manner of press interviews could be imposed:

> "[R]egulations governing the number of interviews each prisoner is to be allowed, the length of such interviews, and assessment of reasonable costs to reimburse the administration for *extraordinary* services would be permissible." 364 F. Supp., at 202.

2. *Security*

Warden Nelson was also asked, in Interrogatory No. 11, "Do you view an interview between a prisoner and a media person as a security threat to the institution?" The answer given was, "only when the inmate is personally dangerous or such interviews are so numerous that the visiting room is crowded with dangerous and/or escape-prone inmates" (A. 55).

Other interrogatories elicited the following information:

No. 15.

> The substance of prisoners' writings may be the basis for refusing a prisoner permission for an interview related to his writings only if his writings are of a character excludable from the institution pursuant to California Penal Code section 2600. In no case heretofore has an interview been denied for that reason. The substance of a prisoner's writings would not lead me to refuse permission for an interview unrelated to his writings.

No. 16.

> In what instances may the substantive content of different outside media lead you to refuse them permission to interview a specific prisoner?

A: Only if the publication actively and characteristically advocated murder. No refusal on this basis is recalled.

No. 17.

A subsequent interview by the same media person would be refused if that person had engaged in violence or smuggling of contraband into the institution, or had violated the visiting rules. Conduct by an inmate which showed him to be dangerous would prevent him from being interviewed. (A. 56).

Moreover, as the district court found, a very large number of outsiders visit California prisoners daily. 364 F. Supp., at 203.[15] While prison security is a legitimate concern of the defendants, there are available methods less drastic than §415.071 to achieve it, including: limitation of the number of interviews so as to assure adequate supervision by correctional officers; reasonable searches of visitors for contraband, escape plans, or weapons. Also, if authorities have good cause to believe that a *particular* interview threatened prison security, it may be denied.[16]

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[15]The visiting regulations are in the record (A. 100-04). They contain a variety of safeguards to reduce the possibility of any security problems.

[16]Where extraordinary exigent circumstances exist, such as a prison riot, officials of course retain appropriate authority to limit visitation, in order to preserve order and security. E.g., *Burnham v. Oswald*, 333 F. Supp. 1128 (W.D.N.Y. 1971) (post-Attica disturbance: press interviews denied); *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973). See also, *Burnham v. Oswald*, 10 Cr. L. Rptr. 2187 (2d Cir. Nov. 15, 1971) (appeal dismissed by agreement, when news media were permitted to interview Attica prison inmates after emergency conditions had ended); and *Burnham v. Oswald*, 342 F. Supp. 880 (W.D.N.Y. 1972) (final judgment declaring right of press interviews under ordinary circumstances).

3. *Rehabilitation*

Defendants-appellants state in their Brief, at 8:

"Director Procunier has also recognized that if an inmate is continually involved in conducting interviews he will have little time to concentrate on other useful activities such as attendance of classes, meeting with counsellors, obtaining psychiatric treatment and participating in other programs."[17]

Of course, plaintiffs-appellees did not seek, nor did the district court order, continuous and unlimited press interviews, to an extent that might interfere with the rehabilitative process.

The court below found that "little more than vague speculation" had been offered to support the proposition that *any* individual press interviews would frustrate rehabilitation. Accordingly, it correctly concluded that §415.071 was not justified by rehabilitative considerations. If anything, rehabilitation would seem to be served, not hampered, by greater communication with the outside world. See, *Palmigiano v. Travisono*, 317 F. Supp. 776, 788 (D.R.I. 1970), and the "Holt Report" (A.180).

4. *The "Big Wheel" Theory*

The Court below observed:

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[17]Mr. Procunier's quoted statement was part of an affidavit offered to the district court "in explanation and justification" of Adm. Bull. No. 72/40, which had been adopted as an interim regulation after the single district judge entered a temporary restraining order. The particular portion quoted related to a limitation of interviews with a specific inmate to once in any six-month period. (Exceptions to this limitation can be approved) (A. 129-130). Although plaintiffs-appellees have stated their objections to Adm. Bull. No. 72/40 (A. 132-196), it should be noted that the Department of Corrections is quite capable of drafting regulations satisfactory to them, which are far less broad than §415.071.

"Defendants' principal argument in defense of §415.071 rests on the 'Big Wheel' or 'celebrity' theory, which states that by gaining notoriety through the press, a particular prisoner oftentimes also gains the respect of and an influence over his fellow inmates."

Hillery v. Procunier, 364 F. Supp., at 203

Notably, appellants never adduced any hard evidence herein to support this unproven theory. Indeed, Director Procunier himself apparently realized that the so-called "Big Wheel" problem could be handled by narrower and more selective regulations,[18] but that his attorney advised against such a move, on legal grounds. (A. 303).

Defendants-appellants' "Big Wheel" argument here resembles the contention advanced, in *Johnson v. Avery*, 393 U.S. 483 (1969), to support a blanket prohibition upon jailhouse lawyers. In reviewing that regulation, this Court acknowledged: "It is indisputable that prison 'writ writers' like petitioner are sometimes a menace to prison discipline." 393 U.S., at 488.[19] Nevertheless, the Court invalidated the ban "unless and until the State provides

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[18]In *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971), prison regulations permitted press interviews with specific inmates, but required prior administrative approval. The denial of such approval as to Bobby Seale, who did not disclaim his reputation as a celebrity, was sustained. Compare, *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (Attorney General's legitimate discretion not to waive statutory exclusion of an alien, was sustained). §415.071 contains no provision for the exercise of administrative discretion.

[19]In a dissenting opinion in *Johnson*, Mr. Justice White, joined by Mr. Justice Black, noted that "the most aggressive and domineering personalities may predominate. . . . Many assert that the aim of the jail house lawyer is not the service of truth and justice, but rather self-aggrandizement, profit and power." 393 U.S., at 499.

some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief." Ibid., at 490.

Significantly, the Court added:

> "Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities." Id.

Similarly, in *Lee v. Washington*, 390 U.S. 333 (1968), this Court held that racial segregation of prisoners was constitutionally prohibited, but it carefully pointed out that the orders of the District Court, which were affirmed, did make allowance for "the necessities of prison security and discipline." 390 U.S., at 334. As Mr. Justice Black stated, in a concurring opinion therein, joined by Mr. Justice Harlan and Mr. Justice Stewart, "prison authorities have the right, acting in good faith and in *particularized* circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails," (emphasis supplied). Ibid.

In *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971), the court observed:

> "While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and

applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them." Ibid., at 1232.

Where, as here, the Director of Corrections declines to defend, as a *correctional* matter, his own overbroad regulation which impairs, not only prisoners' First Amendment rights, but also the public's right to know,[20] then the courts are fully authorized to grant appropriate relief.

CONCLUSION

The district court's judgment in favor of the prisoners is consistent with the decisions of this Court, and with the virtually unanimous opinion of knowledgeable experts in the field of corrections, who endorse the granting of individual press interviews with willing prisoners.[21] The ruling below does not interfere with state

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[20]In *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971), "the public policy relevance of prisoner correspondence was found to implicate the 'right of the public to hear' which in turn 'enhanced' expression rights of the prisoners." Note, *Public and Press Rights of Access to Prisoners After Branzburg and Mandel*, 82 Yale L.J. 1337, 1340 (1973).

[21]The National Advisory Commission on Criminal Justice Standards and Goals' Standard 2.17 provides, in part, in the subsection on MEDIA:

> 1. Grant confidential and uncensored interviews to representatives of the media. Such interviews should be scheduled not to disrupt regular institutional schedules unduly unless during a newsworthy event.
>
> 2. Send uncensored letters and other communications to the media.

See, Task Force Report on Corrections, 67 (U.S. Govt. Printing Office 1973). See also, Report of the Forty-second American

administrative expertise or discretion, but rather, unencumbers California prison officials from the consequences of questionable legal advice, which conflicts with the officials' own correctional opinion and preference. For the foregoing reasons, the judgment of the court below, upholding the rights of the prisoner-plaintiffs, should be affirmed.

Respectfully submitted,

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Assembly, 8 (Dec. 17-20, 1972, Arden House Harriman, New York); NCCD Model Act for the Protection of Rights of Prisoners §7, 18 Crime & Delinquency 13 (1972); Sigler, *New Partnership in Corrections*, 12 Cr. L. Rptr. 2042, 2043 (Oct. 11, 1972).